

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE BIOLASE, INC. SECURITIES
LITIGATION

CASE NO. SACV 13-1300-JLS (FFMx)

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT (Doc. 72) AND
SETTING A FAIRNESS HEARING
FOR OCTOBER 9, 2015 AT 2:30 P.M.**

1 **I. INTRODUCTION**

2 Before the Court is an unopposed Motion for Preliminary Approval of
3 Settlement filed by Lead Plaintiff Pradeep Khurana. (Mot., Doc. 72.) The Motion
4 asks the Court to preliminarily approve the proposed settlement, conditionally
5 certify the settlement class, and approve the form and method of class notice.
6 Having read and considered the papers and taken the matter under submission, the
7 Court GRANTS the Motion and sets a Fairness Hearing for **October 9, 2015, at**
8 **2:30 p.m.**

9

10 **II. BACKGROUND**

11 In August 2013, two proposed class actions were filed against Defendants
12 Biolase, Inc., Federico Pignatelli, Alexander K. Arrow, and Frederick D. Furry. The
13 two cases were captioned *Brady Adams v. Biolase, Inc. et al.*, Case No. SACV 13-
14 1300-JLS (FFMx) (C.D. Cal. Aug. 23, 2013) and *Ralph Divizio v. Biolase Inc et al.*,
15 Case No. SACV 13-1317-JLS (FFMx) (C.D. Cal. Aug. 26, 2013). On December
16 10, 2013, the Court consolidated these cases into the present action and appointed
17 Pradeep Khurana as Lead Plaintiff. (Doc. 31.) The Court also appointed Sandy
18 Liebhard and Joseph Seidman, Jr. as lead counsel for the putative class and Avi
19 Wagner as liaison counsel. (Id.)

20 Lead Plaintiff filed a Consolidated Class Action Complaint for violations of
21 federal securities laws on February 24, 2014, asserting claims under Sections 10(b)
22 and 20(a) of the Securities Exchange Act of 1934 on behalf of “all persons who
23 purchased Biolase common stock [between] November 5, 2012 through August 13,
24 2013 . . .” (Compl., Doc. 36, ¶ 1.) Lead Plaintiff alleges Defendants made
25 materially false and misleading statements about (1) the growth of, and demand for,
26 Biolase’s WaterLase dental laser systems, (2) the general acceptance and adoption
27 of dental lasers by dentists, (3) Biolase’s liquidity, and (4) a “near-term

1 liquidity/cash crisis Biolase was experiencing.” (Id. ¶ 3.) Lead Plaintiff alleges
2 these statements artificially inflated Biolase’s stock price and that class members
3 were damaged when the stock fell upon these statements’ falsity becoming known.
4 (Id. ¶ 29.)

5 On May 9, 2014, Defendants moved to dismiss the Complaint. (Docs. 41,
6 42.) Shortly before the hearing, the parties agreed in principle to settle the case.
7 (Doc. 63.) On April 13, 2015, Lead Plaintiff filed the instant Motion. (Mot.)

The Settlement Agreement provides for a Gross Settlement Fund of \$1,750,000, which Defendants will deposit into an escrow account within ten days of preliminary approval. (Settlement Agreement, Doc. 74-7, §§ 1.2, 1.31, 2.1.) Lead Plaintiff’s counsel may apply for attorneys’ fees of up to 25% of the Gross Settlement Fund as well as reimbursement of costs. (Id. § 7.1.) Lead Plaintiff’s counsel would also be permitted to allocate up to \$100,000 of the Gross Settlement Funds for settlement administration costs. (Id. § 2.3.) After deduction of attorneys’ fees and costs, claims administration costs, and any taxes (*see id.* § 2.8), the remaining Net Settlement Fund would be distributed to class members who timely submitted a Proof of Claim on a *pro rata* basis.¹ (Id. § 6.5) Only class members who incurred an actual monetary loss during the class period would be eligible for payment. (Proposed Notice, Doc. 74-2, at 7.) This includes class members who either (1) purchased and sold Biolase stock at a loss during the class period or (2) purchased Biolase stock during the class period at a price higher than \$1.87 per share and held it at the end of the class period. (Id.) Class Counsel estimates that if all class members submitted claims for each eligible share, the average distribution

²⁵ 1 Specifically, each class member would receive the fraction of the Net Settlement Fund
26 comprising their recognized loss divided by the total of all recognized losses for the Net
27 Settlement Fund. (Proposed Notice, Doc. 74-2, at 7.)

1 per share would be approximately \$.10 before deduction of fees and expenses. (Id.
2 at 1.)

3 The Gross Settlement Fund is non-reversionary; following distribution, any
4 remaining balance after six months would be redistributed on a *pro rata* basis to
5 those class members who timely negotiated their checks and would receive at least
6 \$10 from such redistribution. (Settlement Agreement § 6.10.) Any remaining
7 balance would then be donated to an “appropriate 501(c)(3) non-profit organization
8 designated by Lead Plaintiff and approved by the Court.” (Id.)

9 Upon the Court’s final approval, class members would release all claims
10 against Defendants “arising out of, based upon, or concerning the purchase of
11 Biolase common stock during the Class Period in connection with the subject matter
12 of the Litigation and the acts, facts, statements or omissions that were or could have
13 been alleged” in it. (Id. §§ 1.24, 1.8, 8.1.)

14

15 **A. Legal Standard**

16 Plaintiffs seek conditional certification of the class pursuant to Fed. R. Civ. P.
17 23. When conditionally certifying a class for settlement purposes, a court “must pay
18 undiluted, even heightened, attention to class certification requirements.” *Staton v.*
19 *Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (internal quotation marks and citation
20 omitted).

21 “To obtain class certification, a class plaintiff has the burden of showing that
22 the requirements of Rule 23(a) are met and that the class is maintainable pursuant to
23 Rule 23(b).” *Narouz v. Charter Commc’ns, LLC*, 591 F.3d 1261, 1266 (9th Cir.
24 2010). “Rule 23(a) ensures that the named plaintiffs are appropriate representatives
25 of the class whose claims they wish to litigate.” *Wal-Mart Stores, Inc. v. Dukes*, 131
26 S. Ct. 2541, 2550 (2011). Under Rule 23(a), the party seeking certification must
27 demonstrate, first, that:

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1

2 (1) the class is so numerous that joinder of all members is
3 impracticable, (2) there are questions of law or fact common to the
4 class, (3) the claims or defenses of the representative parties are typical
5 of the claims or defenses of the class, and (4) the representative parties
6 will fairly and adequately protect the interests of the class.

7

8 *Id.* at 2548 (citing Fed. R. Civ. P. 23(a)). “Second, the proposed class must satisfy
9 at least one of the three requirements listed in Rule 23(b).” *Id.* Rule 23(b) is
10 satisfied if:

11

12 (1) prosecuting separate actions by or against individual class members
13 would create a risk of:

14

15 (A) inconsistent or varying adjudications with respect to
16 individual class members that would establish incompatible
17 standards of conduct for the party opposing the class; or

18

19 (B) adjudications with respect to individual class members that,
20 as a practical matter, would be dispositive of the interests of the
21 other members not parties to the individual adjudications or
22 would substantially impair or impede their ability to protect their
23 interests;

24

25 (2) the party opposing the class has acted or refused to act on grounds
26 that apply generally to the class, so that final injunctive relief or
27 corresponding declaratory relief is appropriate respecting the class as a
28 whole; or

29

30 (3) the court finds that the questions of law or fact common to class
31 members predominate over any questions affecting only individual
32 members, and that a class action is superior to other available methods
33 for fairly and efficiently adjudicating the controversy.

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36 Fed. R. Civ. P. 23(b). “Rule 23 does not set forth a mere pleading standard,” thus
37 “[a] party seeking class certification must affirmatively demonstrate his compliance
38 with the Rule – that is, he must be prepared to prove that there are *in fact*

39

1 sufficiently numerous parties, common questions of law or fact, etc.” *Dukes*, 131 S.
 2 Ct. at 2551. This requires a district court to conduct a “rigorous analysis” that
 3 frequently “will entail some overlap with the merits of the plaintiff’s underlying
 4 claim.” *Id.*

5

6 **B. Requirements Under Rule 23(a)**

7 **1. Numerosity**

8 Rule 23(a)(1) requires that the class be “so numerous that joinder of all
 9 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “As a general rule, classes of
 10 forty or more are considered sufficiently numerous.” *Mazza v. Am. Honda Motor*
 11 *Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008), *vacated on other grounds* 254 F.R.D.
 12 610 (9th Cir. 2012); *see also Harris v. Palm Springs Alpine Estates*, 329 F.2d 909,
 13 913-914 (9th Cir. 1964) (“‘Impracticability’ does not mean ‘impossibility,’ but only
 14 the difficulty or inconvenience of joining all members of the class.”) (internal
 15 quotation marks and citation omitted). Here, it is obvious that the number of
 16 shareholder class members far exceeds what is necessary for certification, given that
 17 Biolase had more than 31 million shares of common stock outstanding held by
 18 geographically dispersed class members. (Mem., Doc. 75, at 7.) Under similar
 19 circumstances, courts have found the numerosity requirement met. *See In re*
 20 *Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) (“Some
 21 courts have assumed that the numerosity requirement is met in securities fraud suits
 22 involving nationally traded stocks.”); *In re Applied Micro Circuits Corp. Sec. Litig.*,
 23 No. 01CV0649KAJB, 2003 WL 25419526, at *3 (S.D. Cal. July 15, 2003) (finding
 24 the numerosity requirement met where the defendant issued 298 million shares of
 25 common stock during the Class Period and estimated that the Class had thousands of
 26 members).

27 Numerosity is therefore satisfied.

28

1 2. Commonality

2 Rule 23(a)(2) requires that “there are questions of law or fact common to the
 3 class.” Fed. R. Civ. P. 23(a)(2). “Commonality requires the plaintiff to demonstrate
 4 that the class members ‘have suffered the same injury.’” *Dukes*, 131 S. Ct. at 2551
 5 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). “This does not
 6 mean merely that they have all suffered a violation of the same provision of law,”
 7 but instead that their claim(s) “depend upon a common contention . . . of such a
 8 nature that is capable of classwide resolution – which means that determination of
 9 its truth or falsity will resolve an issue that is central to the validity of each one of
 10 the claims in one stroke.” *Id.* Although “for purposes of Rule 23(a)(2) even a single
 11 common question will do,” *id.* at 2556 (internal citation and quotation marks
 12 omitted), “[w]hat matters to class certification . . . is not the raising of common
 13 ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding to
 14 generate common *answers* apt to drive the resolution of the litigation.” *Id.* at 2551
 15 (emphasis in original) (citation omitted). Moreover, in the context of securities
 16 fraud litigation, “[r]epeated misrepresentations by a company to its stockholders
 17 satisfy the commonality requirement of Rule 23(a)(2).” *Juniper*, 264 F.R.D. at 588.

18 Here, Lead Plaintiff alleges Defendants intentionally and materially
 19 misrepresented (1) demand for Biolase’s products and dental lasers generally and
 20 (2) Biolase’s financial condition. (Compl. ¶¶ 1, 3, 29.) These allegations involve
 21 questions of law and fact common to all class members including: (1) whether
 22 Defendants violated federal securities laws by making materially false and
 23 misleading statements regarding Biolase’s products and financial condition; (2)
 24 whether Defendants knew these statements were false and misleading; (3) whether
 25 Biolase’s share price was artificially inflated because of Defendants’
 26 misrepresentations and omissions; and (4) if class members were damaged, the
 27 appropriate measure of these damages. (*See* Mem. at 8.) These common questions
 28

1 satisfy the commonality requirement. *Cf. In re Alco Intern. Group, Inc., Sec. Litig.*,
2 158 F.R.D. 152, 154 (S.D. Cal. 1994) (“Classic securities fraud cases involving a
3 class of purchasers allegedly defrauded over a period of time by similar
4 misrepresentations satisfy the common question requirement.”); *In re MDC*
5 *Holdings Sec. Litig.*, 754 F. Supp. 785, 801 (S.D. Cal. 1990) (“Here, the existence,
6 nature, and significance of material omissions and misrepresentations are issues
7 common to all class members.”).

8

9 **3. Typicality**

10 Rule 23(a)(3) requires “the claims or defenses of the representative parties [to
11 be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Under
12 the rule’s permissive standards, representative claims are ‘typical’ if they are
13 reasonably coextensive with those of absent class members; they need not be
14 substantially identical.” *Hanlon*, 150 F.3d at 1020. As to the class representative,
15 “[t]ypicality requires that the named plaintiffs be members of the class they
16 represent.” *Id.* at 613 (citing *Falcon*, 457 U.S. at 156). The commonality,
17 typicality, adequacy-of-representation requirements “tend to merge” with each
18 other. *Dukes*, 131 S. Ct. at 2551 at n.5 (citing *Falcon*, 457 U.S. at 157-58 n.13). As
19 a purchaser of Biolase stock during the Class Period, Lead Plaintiff is a member of
20 the proposed class and has suffered the same injury as his fellow class members.
21 (Mem. at 9.) The typicality requirement is therefore satisfied.

22

23 **4. Adequacy**

24 Rule 23(a)(4) permits certification of a class action only if “the representative
25 parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
26 23(a)(4). “Resolution of two questions determines legal adequacy: (1) do the named
27 plaintiffs and their counsel have any conflicts of interest with other class members

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1 and (2) will the named plaintiffs and their counsel prosecute the action vigorously
2 on behalf of the class?” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.
3 1998). In the securities fraud litigation context, the Ninth Circuit has stated that no
4 conflict exists when the lead plaintiff’s claims and the other class members’ claims
5 arise out of the same set of facts. *See, e.g., In re Mego Financial Corp. Sec. Litig.*,
6 213 F.3d 454, 462 (9th Cir. 2000) (stating, in dicta, that there would be no conflict
7 between Lead Plaintiff and other class members if all class members had purchased
8 in the same period).

9 Here, Lead Plaintiff is an adequate representative of the Class. Lead
10 Plaintiff’s claims arise out of the same set of facts as the class members’ claims, and
11 his interest in obtaining the maximum recovery is coextensive with that of the class
12 members. This is sufficient to satisfy the typicality requirement. *See In re*
13 *Surebeam Corp. Sec. Litig.*, No. 03 CV 1721JM(POR), 2004 WL 5159061, at *6
14 (S.D. Cal. Jan. 5, 2004) (finding requirement of typicality met where every proposed
15 plaintiff alleged the same misrepresentations in defendant’s financial statements).
16 The Court finds no sign of any potential conflict between Lead Plaintiff and the rest
17 of the Class.

18 As to the adequacy of Lead Plaintiff’s counsel, the Court must consider “(i)
19 the work counsel has done in identifying or investigating potential claims in the
20 action; (ii) counsel’s experience in handling class actions, other complex litigation,
21 and the types of claims asserted in the action; (iii) counsel’s knowledge of the
22 applicable law; and (iv) the resources that counsel will commit to representing the
23 class.” Fed. R. Civ. P. 23(g)(1)(A). Lead Plaintiff’s counsel has submitted
24 biographies for Jeffrey Haber and Joseph Seidman, members of the firm Bernstein
25 Liebhard LLP, which demonstrate that these attorneys have significant experience in
26 similar securities fraud class action suits. (Doc. 75, Ex. B, at 18-20, 33-34.) Based
27 on counsels’ experience and their work in the matter thus far, the Court concludes
28

1 that Lead Plaintiff's counsel satisfy the adequacy requirements under Rule 23(g).
2 Therefore, the Court appoints Jeffrey Haber and Joseph Seidman as Class Counsel
3 in this matter.

4

5 **C. Requirements Under Rule 23(b)**

6 In addition to establishing the elements of Rule 23(a), a plaintiff must also
7 satisfy one of the three elements of Rule 23(b). Lead Plaintiff seeks certification
8 under Rule 23(b)(3), alleging that common questions predominate over any
9 individual issues that may exist in this case. (Mot. at 12.) Under Rule 23(b)(3), a
10 class action may be maintained if: “the court finds that the questions of law or fact
11 common to class members *predominate* over any questions affecting only individual
12 members, and that a class action is *superior* to other available methods for fairly and
13 efficiently adjudicating the controversy.” Fed. R. Civ. R. 23(b)(3) (emphasis
14 added). The Court may consider:

15

- 16 (a) the class members’ interests in individually controlling the
17 prosecution or defense of separate actions;
18 (b) the extent and nature of any litigation concerning the controversy
19 already begun by or against class members;
20 (c) the desirability or undesirability of concentrating the litigation of
21 the claims in the particular forum; and
22 (d) the likely difficulties in managing a class action.

23

24 Fed. R. Civ. R. 23(b)(3). Lead Plaintiff’s claim satisfies both the predominance and
25 superiority requirements.

26

27 As to the predominance factor, the Supreme Court has explained that it “tests
28 whether proposed classes are sufficiently cohesive to warrant adjudication by
representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). “When
common questions present a significant aspect of the case and they can be resolved

1 for all members of the class in a single adjudication, there is clear justification for
 2 handling the dispute on a representative rather than on an individual basis.” *Hanlon*,
 3 150 F.3d at 1022 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay
 4 Kane, *Federal Practice & Procedure* § 1778 (2d ed. 1986)). “Predominance is a test
 5 readily met in certain cases alleging . . . securities fraud” *Amchem*, 521 U.S. at
 6 625.

7 Here, the common questions described above – whether Defendants made
 8 materially false and misleading statements about Biolase’s products and financial
 9 condition, whether they knew these statements were false and misleading, and
 10 whether Biolase’s share price was artificially inflated as a result – substantially
 11 predominate over the limited individual issues to be resolved, namely the question
 12 of damages. Moreover, while damage amounts may differ among class members,
 13 liability and the proper measure of damages can be determined on a class-wide
 14 basis.² *Cf. In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 640 (C.D. Cal. 2009)
 15 (“[T]he critical questions of what Defendants said, what they knew, what they
 16 withheld, and with what intent they acted, are central to all class members’ claims. . .
 17 . . Issues such as certain members’ damages, timing of sales and purchases, or
 18 standing to file suit, do not have the same primacy.”).

19 The Court also finds that a class action would be a superior method of
 20 adjudicating class members’ claims. “The superiority inquiry under Rule 23(b)(3)
 21 requires determination of whether the objectives of the particular class action
 22 procedure will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. “This

24 ² There are no individual issues to preclude certification, as reliance can be proven on a
 25 classwide basis. In *Amgen Inc.*, the Supreme Court recently reaffirmed the fraud-on-the-market
 26 theory, noting that “[t]he fraud-on-the-market theory [] facilitates class certification by
 27 recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations
 28 when shares are traded in an efficient market.” *Amgen Inc. v. Connecticut Retirement Plans and
 Trust Funds*, 133 S. Ct. 1184, 1193 (2013).

1 determination necessarily involves a comparative evaluation of alternative
 2 mechanisms of dispute resolution.” *Id.* Here, each member of the class pursuing a
 3 claim individually would burden the judiciary and run afoul of Rule 23’s focus on
 4 efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571
 5 F.3d 935, 946 (9th Cir. 2009) (“The overarching focus remains whether trial by
 6 class representation would further the goals of efficiency and judicial economy.”).
 7 Further, litigation costs would likely “dwarf potential recovery” if each class
 8 member litigated individually. *Hanlon*, 150 F.3d at 1023. “[W]here the damages
 9 each plaintiff suffered are not that great, this factor weighs in favor of certifying a
 10 class action.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1198 n.2 (9th
 11 Cir. 2001) (quoting *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal.
 12 1996)).

13 Considering the non-exclusive factors under Rule 23(b)(3)(A)-(D), the Court
 14 finds that class members’ potential interests in individually controlling the
 15 prosecution of separate actions and the potential difficulties in managing the class
 16 action do not outweigh the desirability in concentrating this matter in one litigation.
 17 *See Fed. R. Civ. P. 23(b)(3)(A), (C).* The Court does not foresee any likely
 18 difficulties in managing this case as a class action. Moreover, the Supreme Court
 19 has stated that the predominance test is “readily met in certain cases alleging
 20 consumer or securities fraud.” *Amchem*, 521 U.S. at 625. Therefore, the Court
 21 certifies the following class for purposes of settlement:

22
 23 All Persons who purchased BIOLASE common stock during the period
 24 November 5, 2012 through August 13, 2013, inclusive.

25 Excluded from the Settlement Class are Defendants, members of the
 26 immediate family of the Individual Defendants, any entity in which any
 27 Defendant has or had a controlling interest, current and former directors
 28 and officers of BIOLASE and the legal representatives, heirs,
 successors, or assigns of any such excluded Person or entity. Also

1 excluded from the Settlement Class are those Persons who timely and
2 validly request exclusion from the Settlement Class pursuant to the
3 Notice.

4 (Settlement Agreement §§ 1.28-1.29.)

5

6 **IV. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT**

7 To preliminarily approve a proposed class-action settlement, Rule 23(e)(2)
8 requires the Court to determine whether the proposed settlement is fair, reasonable,
9 and adequate. Fed. R. Civ. P. 23(e)(2). “To determine whether a settlement
10 agreement meets these standards, a district court must consider a number of factors,
11 including: the strength of plaintiffs’ case; the risk, expense, complexity, and likely
12 duration of further litigation; the risk of maintaining class action status throughout
13 the trial; the amount offered in settlement; the extent of discovery completed, and
14 the stage of the proceedings; the experience and views of counsel; the presence of a
15 governmental participant; and the reaction of the class members to the proposed
16 settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal
17 citation and quotation marks omitted). “The relative degree of importance to be
18 attached to any particular factor will depend upon and be dictated by the nature of
19 the claim(s) advanced, the type(s) of relief sought, and the unique facts and
20 circumstances presented by each individual case.” *Officers for Justice v. Civil Serv.*
21 *Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “It is the settlement taken as a whole,
22 rather than the individual component parts, that must be examined for overall
23 fairness, and the settlement must stand or fall in its entirety.” *Staton*, 327 F.3d at
24 960 (quoting *Hanlon*, 150 F.3d at 1026) (alterations omitted).

25 In addition to these factors, where “a settlement agreement is negotiated *prior*
26 to formal class certification,” the Court must also satisfy itself that “the settlement is
27 not the product of collusion among the negotiating parties.” *In re Bluetooth Headset*

1 *Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (internal citations and
2 quotations omitted) (emphasis in original). Accordingly, the Court must look for
3 explicit collusion and “more subtle signs that class counsel have allowed pursuit of
4 their own self-interests and that of certain class members to infect the negotiations.”
5 *Id.* at 947. Such signs include (1) “when counsel receive a disproportionate
6 distribution of the settlement,” (2) “when the parties negotiate a ‘clear sailing’
7 arrangement providing for the payment of attorneys’ fees separate and apart from
8 class funds,” and (3) “when the parties arrange for fees not awarded to revert to
9 defendants rather than be added to the class fund.” *Id.* (internal citations and
10 quotation marks omitted).

11

12 **A. Strength of Lead Plaintiff’s Case**

13 While Lead Plaintiff emphasizes his belief in the merits of this case, he notes
14 that Defendants vigorously litigated this case thus far, and there is no guarantee it
15 would have survived the Motion to Dismiss. (Mem. at 15-16.) Moreover,
16 Defendants likely would have vigorously contested the case at other critical stages
17 including class certification and/or decertification, summary judgment, and trial.
18 Defendants’ Motion to Dismiss raised numerous arguments as to whether the
19 statements underlying this case were actually false and, if so, made with the
20 requisite scienter. In addition, Defendants raised credible arguments as to loss
21 causation. The Court finds these potential obstacles to Lead Plaintiff’s case weigh
22 in favor of preliminary approval.

23

24 **B. Risk, Complexity, and Likely Duration of Further Litigation**

25 Lead Plaintiff notes that “[i]f the Settlement is not approved, the Settlement
26 Class would have to assume the risk that the Motions to Dismiss could be granted in
27 whole or in part.” (Mem. at 18.) Moreover, Lead Plaintiff correctly notes that if the
28

1 case were to proceed past that point, Biolase would likely hotly contest class
2 certification and, if that were granted, pursue later decertification. (Id.) Lead
3 Plaintiff also states that numerous recent Supreme Court decisions have increased
4 the difficulty of obtaining class certification in the securities context. (Id.)
5 Settlement eliminates these risks and may be the last chance for class members to
6 obtain relief. This factor therefore weights in favor of preliminary approval.

7

8 **C. Stage of the Proceedings**

9 This case remains in its infancy; as noted above, the parties reached this
10 settlement days before the scheduled hearing on Defendants' Motion to Dismiss.
11 Nevertheless, the Court is satisfied that Lead Plaintiff is sufficiently abreast of the
12 facts and law of this case to make an informed settlement decision. The
13 Consolidated Class Action Complaint and Motion to Dismiss briefing evidence a
14 deep familiarity with the relevant SEC filings, press releases, analyst reports,
15 conference call transcripts, and news articles. Class Counsel conducted further
16 investigation including interviewing former Biolase employees and working with a
17 damages expert. In addition, Class Counsel represent that they are now conducting
18 "confirmatory discovery" including reviewing additional documents provided by
19 Biolase and interviewing Defendants Furry and Arrow. (Mem. at 20.) Given these
20 facts, the Court concludes that, despite this relatively early settlement and lack of
21 formal discovery, Lead Plaintiff possesses sufficient information to make an
22 informed settlement decision. *See In re Mego*, 213 F.3d at 459 (finding plaintiffs
23 had "sufficient information to make an informed decision about the [s]ettlement"
24 where formal discovery had not been completed but class counsel had "conducted
25 significant investigation, discovery and research, and presented the court with
26 documentation supporting those services").

27

28

1 **D. Risk of Maintaining Class Certification**

2 The Court has not been made aware of any specific risks of maintaining class
3 certification were the case to go to trial. Accordingly, the Court need not consider
4 this factor for settlement purposes. *See In re Veritas Software Corp. Sec. Litig.*, No.
5 C-03-0283 MMC, 2005 WL 3096079, at *5 (N.D. Cal. Nov. 15, 2005) (favoring
6 neither approval nor disapproval of settlement where the court was “unaware of any
7 risk involved in maintaining class action status”), *aff’d in relevant part*, 496 F.3d
8 962 (9th Cir. 2007); *Murillo v. Pac. Gas & Elec. Co.*, No. CIV. 2:08-1974 WBS
9 GGH, 2010 WL 2889728, at *7 (E.D. Cal. July 21, 2010) (favoring neither approval
10 nor disapproval of settlement where the court was “unaware of any specific
11 difficulty in maintaining class-action status were [the] case to continue to trial”).
12

13 **E. Amount Offered in Settlement**

14 The Settlement provides for a Gross Settlement Fund of \$1,750,000, which is
15 a substantial benefit to the class. (Settlement Agreement § 1.2, 2.1.) The Settlement
16 Fund will bear the costs of settlement administration, which are limited to \$100,000.
17 (Settlement Agreement § 2.3.) Thus, after notice and administration costs and
18 litigation expenses, the Settlement Fund will contain roughly \$1,650,000. This
19 represents approximately 8% of the maximum recoverable damages of \$22,100,000
20 estimated by Lead Plaintiff. (Mem. at 19.) This equals or surpasses the recovery in
21 many other securities class actions. *See In re Omnivision Techs., Inc.*, 559 F. Supp.
22 2d 1036, 1042 (N.D. Cal. 2008) (approving an settlement amount in the range of
23 6%-9% of the total possible damages and noting that this is “higher than the median
24 percentage of investor losses recovered in recent shareholder class action
25 settlements”); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCx), 2005 WL
26 1594389, *8 (C.D. Cal. June 10, 2005) (noting that the average amount recovered in
27 securities class action settlements was 2.7% in 2002, 2.8% in 2003, and 2.3% in
28

1 2004). Considering the difficulties of potential recovery in this case, the Court
2 finds that the amount offered in settlement weighs in favor of preliminary approval.
3

4 **F. Experience and Views of Counsel**

5 “The recommendations of plaintiffs’ counsel should be given a presumption
6 of reasonableness.” *In re Omnivision*, 559 F. Supp. 2d at 1043 (internal citation and
7 quotation marks omitted). As discussed above, Class Counsel have significant
8 experience serving as plaintiffs’ counsel in securities class actions, and have fully
9 endorsed the settlement agreement as fair, reasonable, and adequate. (Settlement
10 Agreement at 5.) Therefore, the recommendation of counsel also weighs in favor of
11 approving the settlement.

12
13 **G. Reaction of Class Members to Proposed Settlement**

14 While Class Counsel states in the moving papers that Lead Plaintiff supports
15 the settlement – a statement not corroborated with a supporting declaration from
16 Lead Plaintiff – other settlement class members have not yet had the opportunity to
17 evaluate the proposed settlement and submit any objections. (*See* Mem. at 21.) The
18 Court agrees with Lead Plaintiff that evaluation of this factor is more proper at the
19 final approval stage. Prior to the Fairness Hearing, Class Counsel shall submit a
20 declaration from Lead Plaintiff and a sufficient number of declarations from other
21 class members discussing their reactions to the proposed settlement. A small
22 number of objections at the time of the fairness hearing may raise a presumption that
23 the settlement is favorable to the class. *See Omnivision*, 559 F. Supp. 2d at 1043.

24
25 **H. Signs of Collusion**

26 The Court finds no signs, explicit or subtle, of collusion between the parties.
27 Under the Settlement Agreement, attorneys’ fees are to be awarded from the Gross
28

1 Settlement Fund, and therefore, there is no “clear sailing” arrangement. (Settlement
2 Agreement §§ 6.5, 7.1.) Furthermore, the Court is to determine the proportion of
3 the Settlement Fund that will be awarded as attorneys’ fees. (Id.) Finally, the
4 Settlement provides for any balance remaining in the Settlement Fund after six
5 months to be redistributed to settlement class members “who negotiated the checks
6 sent to them in the initial distribution and who would receive at least \$10.00 from
7 such redistribution” (Settlement Agreement § 6.10.) Any remaining amount in
8 the Settlement Fund would go to the designated *cy pres* recipient. (Id.) Therefore,
9 the Court finds that these factors weigh in favor of approval.

10

11 **I. Conclusion**

12 Based on the foregoing, the Court concludes the Settlement Agreement is fair,
13 reasonable, and adequate and finds preliminary approval is appropriate.

14 The Settlement Agreement is deficient in only one respect – it fails to
15 designate a specific *cy pres* recipient to which any undistributed amount of the
16 Settlement Fund will be sent. While this does not warrant denial of preliminary
17 approval, Class Counsel shall identify a specific *cy pres* recipient and submit it to
18 the Court for approval within **21 days** of this Order. Class Counsel should bear in
19 mind that even a worthy nonprofit organization will not be found to be a proper *cy*
20 *pres* recipient if it bears no relation to the class. *See, e.g., Dennis v. Kellogg Co.*,
21 697 F.3d 858, 865 (9th Cir. 2012); *see also Brandon Johnson v. Metlife Inc. et al.*,
22 Case No. SACV 13-128-JLS (RNBx) (C.D. Cal. Jan. 25, 2013), ECF Nos. 43, 46.

23

24 **V. PRELIMINARY APPROVAL OF CLASS NOTICE FORM**
25 **AND METHOD**

26 For a class certified under Rule 23(b)(3), “the court must direct to class
27 members the best notice that is practicable under the circumstances, including

28

1 individual notice to all members who can be identified through reasonable effort.”
 2 Fed. R. Civ. P. 23(c)(2)(B). However, actual notice is not required. *See Silber v.*
 3 *Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

4 Here, the Settlement Agreement provides that within ten days of preliminary
 5 approval, Defendants will use “reasonable efforts” to provide Lead Counsel with the
 6 last known names and addresses of all purchasers of Biolase stock during the class
 7 period. (Settlement Agreement § 6.2.) Biolase will bear the expense of providing
 8 this information. (Id.) The Claims Administrator will then mail the proposed
 9 Notice and Proof of Claim. If the mail is returned, the Claims Administrator will
 10 attempt to locate the class member’s new address through the National Change of
 11 Address database. If an updated address is found, the Claims Administrator will
 12 mail the documents to that address. Notice by mail has been found by the Supreme
 13 Court to be sufficient if the notice is “reasonably calculated . . . to apprise interested
 14 parties of the pendency of the action and afford them an opportunity to present their
 15 objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314
 16 (1950). In addition, Lead Plaintiff will provide a summary notice by publication in
 17 Investor’s Business Daily. (Settlement Agreement §§ 1.23, 2.3.)

18 Plaintiff has provided the Court with a copy of the proposed notice. (*See*
 19 Proposed Notice, Doc. 74-2, Ex. A-1; Proposed Proof of Claim, Doc. 74-3, Ex. A-
 20 2.) Under Rule 23, the notice must include, in a manner that is understandable to
 21 potential class members, “(i) the nature of the action; (ii) the definition of the class
 22 certified; (iii) the class claims, issues, or defenses; (iv) that a class member may
 23 enter an appearance through an attorney if the member so desires; (v) that the court
 24 will exclude from the class any member who requests exclusion; (vi) the time and
 25 manner for requesting exclusion; and (vii) the binding effect of a class judgment on
 26 members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B).

27 Here, the proposed notice includes information about the nature of the
 28

1 litigation, the scope of the class involved, and claims against Defendants. (Proposed
2 Notice.) The proposed notice clearly explains that class members must file a Claim
3 Form in order to receive any part of the settlement, that they must send some
4 notification to the claims administrator to opt out of the proposed class, and that by
5 doing nothing, they give up any right to sue the Defendants or the Released Parties
6 for the claims released by the Settlement Agreement. (Id.) Accordingly, the Court
7 finds the proposed notice sufficient as to both the method of delivery and contents,
8 provided the following modifications are made:

- 9 • Class Counsel shall ensure all dates and deadlines in the Notice and
10 Proof of Claim forms conform to those set forth by the Court below,
11 which differ slightly from the dates proposed by counsel.
- 12 • Under Section 21, “How Will the Lawyers Be Paid?”, the Notice
13 should clearly set forth that Class Counsel’s motion for attorneys’ fees
14 and costs will be filed before the deadline to object or opt out.
- 15 • Under Section 26, “May I Speak at the Hearing?”, the Notice should
16 give the Court’s address in full rather than referring the reader to
17 Section 22 which, in any case, gives only the Claims Administrator’s
18 address, not the Court’s.
- 19 • Under Section 28, “Are There More Details About the Settlement?”,
20 the Notice should state that all papers filed in this action will be
21 available for review as part of the Court’s files in this matter at the
22 Office of the Clerk of Court or “via the Court’s PACER (Public Access
23 to Court Electronic Records) website,” along with PACER’s URL
24 (<http://www.pacer.gov>).

25 The parties must provide an updated copy of the Notice and related forms
26 within **10 days** of this order reflecting the changes identified above.
27
28

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion and PRELIMINARILY APPROVES the settlement. In addition, the Court sets the following dates:

Event	Date
Mail Notice	June 15, 2015
Submit Updated Notice to Court	June 15, 2015
Submit <i>Cy Pres</i> Recipient to Court for Approval	June 25, 2015
Publication Notice	June 30, 2015
Deadline to Submit Proofs of Claim	August 15, 2015
Briefs in Support of Final Approval and Attorneys' Fees Request	September 4, 2015
Last Date to Object / Opt Out	September 24, 2015
Fairness Hearing	October 9, 2015, at 2:30 p.m.

DATED: June 5, 2015



JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE